IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.A.No.138 of 2006

Judgment reserved on 26.12.2006

Date of decision 11.1.2007

Raj Kumar alias Raju Appellant

Versus

State of H.P. Respondent

Coram:

The Hon'ble Mr. Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellant : Mr.Parneet Gupta, Advocate.

For the respondent: Mr.Ashutosh Burathoki, Addl. Advocate General.

V.K.Ahuja, J.

This is an appeal filed by the appellant against the judgment of the court of learned Sessions Judge, Kullu dated 5.4.2006, vide which the appellant was held guilty under Sections 376 and 452 IPC and was convicted and sentenced as under :

The appellant was convicted under Sections 452 and 376 IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs.5000/- for the commission of offence under Section 376 IPC. In default of payment of fine, the appellant was ordered to suffer imprisonment for one year. The appellant was further sentenced to rigorous imprisonment for two years and to pay fine of Rs.1000/- for the commission of offence under Section 452 IPC. In default of payment of fine, the convict was ordered to imprisonment for one month. The sentences awarded were ordered to run concurrently.

Briefly stated the facts of the case are that on 29.4.2005 at about 8.15 a.m., a telephonic message was received at Police Chowki Jari, District Kullu from one Jindu Ram, Pradhan that one Raj Kumar who was

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

serving with him as a labourer has entered his house and committed rape with his wife who has been apprehended at the spot. On receipt of this report a Rapat was entered at the Police Chowki and a police official reached the spot and recorded the statement of Smt.Nalthi Devi complainant under Section 154 Cr.P.C. In the said complaint she alleged that she was married to Jindu Ram for the last 24 years and two sons and one daughter were born to her. On the previous night her husband, sons and daughter-in-law had gone to Village Dharambehar where they have constructed their new house. Her daughter Budhi Devi and her grand son aged about 8 years were in the house. She was sleeping along with her grand son in the room, while her daughter was sleeping in the adjoining room. At about 10 p.m. Raj Kumar who was working with her husband as labourer and living in a khokha nearby, entered her room after opening the door and caught hold of her. He committed rape upon her. She tried to rescue herself and raised noise and on hearing the noise, her daughter Budhi Devi came there. Thereafter the persons from the nearby village, namely, Chaine Ram,Shiv Chand, Nathu Ram, Kessi Ram etc. also reached there and apprehended Raj Kumar who was under the influence of liquor. It was further alleged that Nup Ram and Kalu Ram went to call her husband who came back at about 5 a.m. On this statement a case was registered and investigated by the police. The Medical Officer PW-1 Dr.Geeta Kaul who examined the prosecutrix opined that the prosecutrix was subjected to sexual inter course and the prosecutrix was exposed to frequent coitus. The accused was also medically examined and was found fit to perform sexual intercourse. As per the opinion of PW-10 Dr. Rajender Kohli. The police also took into possession the certificate from the Panchayat in regard to the caste of the prosecutrix and her husband. On completion of the investigation challan was filed before the court. The learned Sessions Judge framed charge against the appellant under Sections 452 and 376 of the IPC. On conclusion of the trail the appellant was held guilty and was convicted and sentenced as detailed above.

I have heard Mr. Parneet Gupta, learned counsel for the appellant and Mr.Ashutosh Burathoki, learned Additional Advocate General for the respondent and have gone through the record.

The submissions made by the learned counsel for the appellant was that it has not come up in the statement of the prosecutrix that she resisted when rape was committed by the appellant or raised any alarm and therefore her statement cannot be believed. It was also submitted that the prosecution has not examined all the persons who had gone to call the husband of the prosecutrix and only PW-4 Chaine Ram was examined, but no other witness was examined. It was also submitted that there were no marks of struggle on the person of the prosecutrix and as such her statement cannot be relied upon. The main point taken by the learned counsel for the appellant was that the accused had been employed by the husband of the prosecutrix and some wages were due and the appellant had gone in the morning to the house of prosecutrix's husband to demand wages and to avoid payment, this false case was foisted upon the appellant. It was thus submitted that the findings of the learned trial court holding the appellant guilty of the charge framed against him and convicting him are liable to be set aside.

On the other hand, Mr.Ashutosh Burathoki, learned Additional Advocate General appearing for the respondent-State had supported the impugned judgment for the reasons given therein supplementing it by the submission that the prosecutrix had raised an alarm upon which her daughter reached the spot which fact finds corroboration from the statement of her daughter. It was also submitted that it is not required that there should have been marks of struggle on the person of the prosecutrix who was sleeping at the time the attempt was made by the accused who committed rape thereafter. In regard to the defence plea it was submitted that there is nothing on record to establish that the appellant had come only in the morning or the prosecutrix's husband had falsely implicated the

appellant to avoid payment of his wages. Thus it was submitted that there was no merit in the appeal which deserves to be dismissed accordingly.

Coming to the evidence led by the prosecution, it is clear that there is statement of PW-2 Smt.Nathi Devi the prosecuturix who had clearly stated that she is an illiterate and it was about 10 p.m. when she was sleeping in her room and her husband was away. Her daughter was sleeping in another room and her grand son who is studying in first class was sleeping in her room. The appellant entered her room under the influence of liquor and committed forcible sexual intercourse with her. She stated that he daughter came there started crying and four persons named by her including PW-4 Chaine Ram came there gave beatings to the accused and then three persons had gone to call her husband who reached there at about 3-4 a.m. She narrated the whole of the incident to her husband who telephoned the police who came there and recorded her statement Ex.PW-2/A.

A perusal of her statement shows that she has not specifically stated that she resisted the attempt made by the accused though in her statement under Section 154 Cr.P.C. Ex.PW-2/A she had stated that she has attempted to save herself and raised an alarm upon which her daughter came there. She was not confronted with this part of the statement made by her to the police. Even in cross-examination she was not put any question in regard to the resistance made by her or alarm raised by her. The mere fact that she omitted to mention these two facts when she was examined by the learned Public Prosecutor in the court is not sufficient to hold that her statement cannot be relied upon. These questions could have been put to her if felt necessary in her cross-examination, but no such question was put. However, PW-3 Kumari Bodhi Devi her daughter has clearly stated in her stated that at about 10 p.m., she heard the cries of her mother upon which she got up and went towards the room of her mother. She opened the door and found the accused committing forcible sexual inter course with her mother.

Therefore, she called her cousin Chaine Ram upon which he and Shiv Ram came there and accused was on the bed of her mother. She further stated that the pant of the accused was half worn. Shiv Ram and Chaine Ram asked the accused to remain there and thereafter Kessi Ram and Nup Ram also came there. She further stated that accused tried to ran away but the above named persons asked him to remain on the spot. Out of four persons Nup Ram and Kalu Ram went to call her father who reached there at 5 a.m.

A plea was raised by learned counsel for the appellant that it is surprising that the prosecutrix slept in the room without bolting the door from inside. There is no merit in this submission and it is not required of a woman to have bolted the door of her room from inside when she was sleeping along with her grand son. It may be that the main entrance may have been locked by her or her daughter. It can not be expected of a villager sleeping alone in her room that she will bolt the door from inside of her individual room also before going to bed. Her daughter is in the adjoining room and there no necessity for her to have bolted the door from inside and the fact that the door was locked or not depends upon the individual behaviour of the person and no general behaviour can be expected that the door must have been bolted. Once the main entrance may have been locked about which no questions were put, it was not required that the prosecutrix should have bolted the door from inside also and this contention is repelled being devoid of any force.

Another plea raised by learned counsel for the appellant was in regard to the contradictions in the statements of the prosecutrix as PW-2 and her daughter PW-3. The contradiction pointed out was that PW-2 prosecutrix had stated that when her daughter came, the door of her room was bolted from inside and her daughter gave a knock and she had opened the door. On this aspect PW-3 had stated that when she came to the room of her mother and opened the door, she found that the accused was committing forcible sexual intercourse with her mother. I agree that

there is a contradiction in regard to this fact as to whether the door was opened by the prosecutrix or it was opened by her daughter who found the accused committing sexual intercourse with her mother. This contradiction in itself cannot be said to be material, as in my view it was a minor contradiction. It may be that to supplement her statement PW-3 had stated that the accused was over her mother and was committing sexual intercourse when she entered the room. In case the statement of PW-2 prosecutrix is believed in this aspect it may be that the door had been bolted by the accused when he entered the room and when PW-3 prosecutrix's daughter entered the room on hearing the cries, it was opened by the prosecutrix. This contradiction could have been said to be relevant in case any plea of consent had been taken by the accused which is not so in the present case. Neither any plea of consent was taken by the accused, nor it is made out from the statements of the prosecution witnesses in any manner and therefore this contradiction, which is minor in nature and does not affect the merits of the case.

Coming to the plea again in regard to the non raising of any alarm by the prosecutrix, she has not stated to in the court that she raised an alarm, but her daughter has clearly corroborated the statement of her mother and stated that she reached there in the room of her mother on hearing her cries and thereafter she raised an alarm and other persons also came there. During the course of the arguments a plea was also raised by the learned counsel for the appellant that in case the prosecutrix had raised an alarm herself several persons from the adjoining houses who are having their rooms in the same building, as per site plan Ex.PW13/A could have reached the spot. A reference was made to the site plan which shows that the rooms of other persons namely, Nup Ram, Jindu Ram and another two houses are also nearby. This shows that some of the persons were living in the adjoining rooms though in the same building. It cannot be expected of a woman who was sleeping in her room, was taken unaware of an attempt made by their labourer to commit rape

who succeeded in his attempt that she should have raised the alarm at such a high pitch that the persons from the other houses should have reached there. She did raise an alarm attracting the attention of her daughter who came from the nearby room and it cannot be expected that persons living in the nearby rooms would also have been able to hear the alarm of the prosecutrix when she was suddenly attacked by the accused to commit rape. The persons may be sleeping in their rooms or may not have heard the voice of prosecutrix since the accused had pounced upon her in her sleep and committed rape at that time. The prosecutrix had raised an alarm. Therefore the contention put forth by the learned counsel for the appellant falls squarely on the ground and no benefit can be taken of the minor contradictions referred to above or the fact that other persons could not hear the alarm raised by the prosecutrix herself.

Coming to the evidence the statement of prosecutrix and her daughter on all material facts have been further corroborated by PW-5 Jindu Ram, husband of the prosecutrix who had clearly stated that Shiv Chand, Nup Ram and Kalu Ram came there and told him about the rape committed by the accused with his wife and he reached his house at about 5 a.m. PW-4 Chaine Ram cousin of PW-3 Kumari Bodhi Devi, has clearly stated that he was in his room at 10 p.m. and his house is adjoining to the house of prosecutrix. He heard the voice of PW-3 loudly and he went there accompanied by Shiv Chand. He stated that when he reached there they saw the accused sitting by the side of the bed of prosecutrix, which bed was on the floor and prosecutrix told that accused had committed forcible sexual intercourse with her. He also stated about the presence of Nup Ram and Kalu Ram who reached there and they had gone to call the husband of the prosecutrix along with one Shiv Chand and they reached at about 5 a.m. The mere fact that he is nephew of the prosecutrix’s husband is not sufficient to disbelieve him since he is a natural witness having his room adjoining to the room of prosecutrix and as such his presence was in the natural course of events. There is nothing to

disbelieve him. The mere fact that the other persons who had reached the spot or had gone to call the husband of the prosecutrix were not examined is not sufficient to hold that an adverse inference should be drawn against the prosecution for having withheld the material witnesses. Out of the four persons who had reached, there one had been examined, namely, PW-4 Chaine Ram and the other witnesses were not examined who can not be said to be very material and they were given up being of repetitive nature as per the statement made by the learned Public Prosecutor. They were not the witness of actual rape and their statement was not material and one of them has been examined. It is not the quantity or the number of persons examined which can be said to be material and the material point is the credibility of the statement made by PW-4 Chaine Ram whose statement does not suffer from any infirmity.

Coming to the defence plea taken by the appellant before the learned trial court a suggestion was made to the prosecutrix as PW-2 and her daughter PW-3 and they denied their knowledge in case any money was due to the accused payable by PW-5 Jindu Ram husband of the prosecutrix. The suggestion was also put to PW-5 in this regard and he denied that the accused had worked as a labourer on daily wage basis for nine months and had not been paid the wages for six months. PW-5 further denied having called the accused in the early hours of morning for making payment of his wages. It looks surprising that PW-5 will call the accused in the early hours of morning to settle payment of his wages particularly when he himself stated that when he was going to his house in the other village during day time, accused had met him and had disclosed that he was going to cut wood in some village. He has clearly stated that the accused had worked as a labourer with him and had been engaged for this work. But he denied that any amount was due to him and to avoid making payment, the accused had been falsely implicated. It looks surprising that PW-5 will falsely implicate his labouer for having raped his wife particularly when out of the wages of nine months, the wages for

three months as per the suggestion had already been paid to him and there is nothing on record that the wages for six months were due and were demanded by the accused but were not paid by the PW-5. In case there was any dispute the accused could have refused to continue working until and unless he was paid or could have made any complaint to any authority including complaint for non payment of wages. Further it does not appeal to me that PW-5 Jindu Ram husband of the prosecutrix will falsely implicate the accused for the rape of his wife who was a middle aged lady having married sons and that too simply on the ground just to avoid the payment of small a sum of Rs.5000/-.

Apart from the above, it is not only the testimony of PW-5, which is being challenged that to avoid payment he had falsely implicated the accused. It is also the testimony of the prosecutrix herself, her daughter and PW-4 Chaine Ram being doubted that it was a false case and no rape was committed by the appellant. It is unbelievable that all these witnesses will depose falsely to implicate the appellant who was working as a labourer with them and he had been apprehended at the spot and was found present there when the police reached the spot and he had been made to remain there and was not allowed to run away from the spot. The appellant could not establish how he was present during the night in the house of the prosecutrix in the absence of her husband and how he was apprehended by those persons who did not allow him to leave the place till the prosecutrix's husband and police reached the spot. The defence plea taken by the appellant does not inspire confidence and does not stand substantiated so as to raise any doubt in the mind of the court. No reasonable person will try to implicate the name of his wife of having been raped by their labourer who had been engaged by them particularly when the lady is of middle aged lady having married children and grandchild also.

Coming to the testimony of medical officer who examined the prosecutrix, there is statement of PW-1 Dr.Geeta Kaul who examined the prosecutrix and had observed as under :

1. No laceration or bruising of vulva
2. Labia majora not covering labia minora
3. Vaginal introitus admits two fingers
4. Hymen torn, old tag
5. P/V present-ut AV, MPS fornices clear.

She had firstly stated in her examination that the intercourse was committed with prosecutrix seven days prior to the date and time of examination and that she was exposed to frequent coitus. Being a married woman and having her husband living with her, the prosecurtrix must have been exposed to frequent coitus. The medical officer was re-examined by the trial court on application by the learned Public Prosecutor for the State and she corrected her statement that sexual intercourse was committed within 7 days and not what she stated in her cross-examination that seven days prior to the date and time of the examination. From her statement it appears that the medical officer correctly gave the opinion now that the sexual intercourse was committed within seven days though she could not have specifically stated if that was committed seven days prior to the date. The medical officer could not have specifically stated that it was conducted prior to seven days and now this statement that it may have been committed within seven days. The Medical Officer who examined the accused had been examined as PW-10 Dr.Rajinder Kohli who had found the accused physically as well as mentally fit to perform sexual intercourse and had issued the MLC Ex.PW-10/B. The physical fitness of the accused was required to be proved, but I cannot say as to how the medical officer also opined that he was mentally fit to perform sexual intercourse.

Apart from the above the report of the Assistant Director, FSL Ex.PA further lends credence to the prosecution story and it shows that human semen was found on the salwar of the prosecutrix as well as of

vaginal slides of prosecutrix and the underwear of the accused. These further corroborates the testimony of the prosecutrix that human semen was found on her salwar, vaginal slides of prosecutrix and underwear of the accused. It assumes significance since the husband of the prosecutrix was away and it shows that she had been subjected to sexual intercourse which stands proved from the clothes taken from her possession by the Medical Officer. In regard to the non presence of injuries on the person of the prosecutrix, it has been rightly submitted by learned Addl. Advocate General that it is not necessary that there must have been marks of violence on the person of the prosecutrix and non presence of marks of struggle is not sufficient to hold that her statement cannot be relied upon.

It is not the requirement of law that in case no injuries are found on the person of the prosecutrix or near her private part, her statement cannot be relied upon. I may make a reference to the decision relied upon by the learned Additional Advocate General in **State of H.P. vs. Lekh Raj and another,** (2000)1 SCC 247. In this case it was held by the Lordships of Hon'ble Apex Court that the absence of dead or mobile spermatozoa in the vagina or in the cervix of the prosecutrix, held, not a conclusive proof of her not being subjected to forcible sexual intercourse. It was also observed that minor discrepancy or variance in evidence, held, does not make the prosecution's case doubtful. It may rather led credential to the deposition.

I have already held above, that the minor discrepancy in the statements of prosecutrix, her daughter does not affect their testimony and has to be ignored. In regard to the injuries on the person of the prosecurtrix, I may observe that when a middle aged lady in her sleep is suddenly attacked by a person who pounced upon her and subjects her to forcible rape, it can be assumed as to how much resistance she can put to the attempt made upon her. In case the attempt has been made upon her when she was not in sleep or had not been taken by surprise in such an attack made by the accused, she may resist or raise an alarm, but in my

opinion not much struggle can be made by such an helpless woman who was in her sleep and was taken by surprise by an accused who committed sexual intercourse against her wish. Therefore, the mere fact that there were no marks of struggle or violence on her person or that of the accused is not sufficient to disbelieve her testimony.

From the above detailed discussion of evidence it is clear that the statement of the prosecutrix can be termed as reliable which finds corroboration on material particulars from the statement of her daughter, her nephew who reached there and from the statement of her husband who was immediately called to the spot. The FIR was lodged with promptitude and therefore there is no question of false implication of the accused and it gave no time to the prosecutrix or her husband to falsely make out a case or introduce the names of persons or witnesses who reached the spot immediately at that time. The accused was found present in the house when the husband of the prosecutrix reached there and he had been made to sit there by Chain Ram, PW-4 and other persons, who as per evidence had also given some beatings to the accused who tried to escape from the place of occurrence. I have carefully examined the statement of the prosecutrix as well as that of other witnesses and there is no infirmity in their statements or contradictors so as to hold that these statements do not inspire confidence. The evidence has been duly considered by the learned trial court also who had come to a right conclusion that the appellant had committed this offence and was therefore rightly held guilty under Sections 376 and 452 of the IPC.

No other point was urged by learned Additional Advocate General for the appellant during the course of arguments.

Coming to the sentence imposed by the learned trial court no arguments were advanced by the learned counsel for the appellant on the sentence imposed by the learned trial court. However, it is clear that the appellant had committed rape upon a wife of his employer who had provided him employment and had engaged him on daily wage basis or on

contract basis to work as a labourer. The appellant had mis-utilized the faith reposed in him by prosecuturix's husband who had provided him some accommodation also near to his house, but that faith as reposed in him had been broken by the accused who rather committed the rape upon the wife of her employer and the lady was a middle aged lady having married children as well as grand son also. Therefore the appellant does not deserve any leniency since he raped middle aged wife of his employer and the sentence of 7 years imposed upon him by the learned trial court under Section 376 IPC can be said to be appropriate and not excessive which calls for no interference by this Court. The final sentence imposed by the learned trial court under Section 376 and 452 of the IPC therefore deserves to be confirmed and the same is confirmed accordingly.

In view of the above discussion, I accordingly held that there is no merit in the appeal and the same is dismissed accordingly. Copy of the judgment be sent to the appellant through Jail Superintendent for information.

January 11,2007(g) **(V.K.Ahuja),J.**